

MEMORANDUM

To: File
From: David L. Nielsen, City Attorney
Subject: Annexation Procedures
Date: March 2, 2007

There are six statutory methods for annexation of land into a municipality. Each of the six methods is independent from the others and each is accomplished by its own statutory standards. The common requirement in all of the methods is that service must be provided according to a plan provided by a city in accordance with §7-2-4732, MCA. A first-class city such as Helena is exempt from this requirement if it mutually agrees upon a plan for service with the owners of the property to be annexed. Section 7-2-4732, MCA, requires the service plan to provide a long-range plan for extension of services and a method for financing the extension of services. Additionally, under §7-2-4211, MCA, regardless of method of annexation the City must include in the annexation the full width of any public street or roads, including the rights-of-way that are adjacent to the property being annexed.

Each of the methods, with a summary of the requirements, is as follows:

1. **Addition to Municipalities**, Title 7, chapter 2, part 42, MCA. This is the oldest statutory method of annexation - created by the Legislature in 1895. Under this rather simple method, when there is territory adjoining a city that has been surveyed and laid out into streets or blocks as an addition, the territory becomes part of the city upon: a) the filing of the map or plat with the clerk and recorder; and b) approval of the mayor and a majority of the council endorsed thereon. Section 7-2-4201, MCA. Under this method a majority of a commission could add contiguous platted lots to a city by a simple motion. There is no requirement for notification of property owners, setting a public hearing, or allowing for a protest. I would recommend using a public notice, hearing, and protest method although they are not legally required. Under this method, most of the platted portion of the west side could be annexed into Helena without the consent of property owners, provided there was either a city plan for the extension of services and financing of the extension of services or a mutual agreement with the property owners on a plan.
2. **Annexation of Contiguous Land**, Title 7, chapter 2, part 43, MCA. Under this method, contiguous land, except land used for industrial, railroad, or manufacturing purposes, may be annexed under the following procedure:
 - a. Commission passes a resolution of intention to annex. Notice of resolution is given to all registered voters in area to be annexed and notice is published.

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b. If there are less than 300 recorded parcels, the commission may approve the annexation providing the resolution is not "disapproved" by a majority of the owners of property to be annexed. If there are more than 300 recorded parcels, the commission must call for an election within 45 days after approving the resolution of intention. Only registered voters living in the area proposed to be annexation are allowed to vote on the issue.

c. If the annexation resolution is defeated, there is a one-year moratorium on annexation, except for annexation by petition.

This procedure is the result of changes by the 1997 Legislature responding to property owners from Missoula who resisted Missoula's attempts at forced annexation on the west side. This procedure is now fairly cumbersome and has significant risks.

3. **Annexation of Contiguous Government Land**, Title 7, chapter 2, part 44, MCA. Under this part, government land that is contiguous to a city may be annexed upon a request for annexation by a government official. Section 7-2-4403, MCA. Upon receipt of the request, the city passes a resolution of intent to annex and gives public notice of a protest period of 20 days after the first publication of the notice. The city then holds a hearing on the matter and after the hearing the annexation may be granted if it is found that the annexation is in the best interests of the city and its inhabitants to annex the property.

4. **Annexation of Wholly Surrounded Land**, Title 7, chapter 2, part 45 MCA. Under this part, a city may annex property that is wholly surrounded by the city without concern for a right of protest or election. The only wholly surrounded property that may not be annexed is property used for agricultural, mining, smelting, refining, transportation, any industrial or manufacturing purposes, or purpose of maintaining or operating a golf or country club, an athletic field or aircraft landing field, a cemetery, or a place for public or private outdoor entertainment, or any purpose incidental thereto.

5. **Annexation by Petition**, Title 7, chapter 2, part 46 MCA. Under this procedure, a city may adopt a resolution of annexation upon receipt of a petition signed by 33 1/3% of resident electors owning real property in the area proposed to be annexed. In such a case the city orders an election on the issue. All electors in the city, and the electors residing in the area proposed to be annexed, may vote on the issue. If the annexation proposal is approved by a majority of electors, the city shall, within 30 days of the election, pass a resolution providing for the annexation. The city would not have the discretion to disapprove an annexation passed by the electorate.

In the alternative, if a petition for annexation is signed by either more than 50% of the resident electors of the area proposed to be annexed or by the owners of more than 50% of the property proposed for annexation, the city may approve the annexation. The city may consider the annexation

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upon the merits of the petition. This is the procedure predominately used by Helena, only we require 100% approval from the property owners.

There is no statutory requirement that property to be annexed by petition be contiguous to the city. In fact, §7-2-4609(1), MCA, clearly states that part 46, which allows annexation by petition, does not repeal the annexation procedures in parts 43 and 45 requiring contiguity for annexation. In light of this statutory section, annexations by petition do not require that the annexed property be contiguous to the city.

Property used in whole or in part for agricultural, mining, smelting, refining, transportation, or any industrial or manufacturing purpose may not be annexed by the petition method.

6. **Annexation with the Provision of Services**, Title 7, chapter 2, part 47, MCA. This provision is the newest statutory procedure, being enacted in 1974. The emphasis of this procedure is that the city must first develop a plan for providing services into areas to be annexed and for the financing of those services. The plan for extension of services, which is the basis for this annexation, must be long-range, show anticipated development a minimum of 5 years into the future, and show how the city plans to extend services to, develop, and annex property into the city on a yearly basis.

Under this procedure, the city may initiate the annexation process or it may be commenced by petition. The lands to be annexed must be contiguous to the city, not be within another municipality's boundaries, and must be part of a growth policy (formerly referred to as a comprehensive plan). If the city initiates the annexation, there is a resolution of intention with a notice and public hearing. For a period of 45 days after the public hearing the city may receive written protests. If more than a majority of the real property owners disapprove of the annexation in writing, there is a one-year moratorium on the city initiating another annexation for that particular property.

7-2-4703. Purpose. It is the purpose of this part to develop a just and equitable system of adding to and increasing city boundaries for the state of Montana, which will develop the following firm policies:

(1) Sound urban development is essential to the continued economic development of this state, and any annexation prepared must be well planned in advance.

(2) Municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety, and welfare in areas being intensively used for residential, commercial, industrial, institutional, and governmental purposes or in areas undergoing such development, and future annexations must consider these principles.

(3) Municipal boundaries should be extended in accordance with legislative standards applicable throughout the state to include such areas and to provide the high quality of governmental services needed for the public health, safety, and welfare.


(4) Areas annexed to municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality as soon as possible following annexation.

History: En. 11-515 by Sec. 2, Ch. 364, L. 1974; R.C.M. 1947, 11-515(part).

MEMORANDUM

March 2, 2007

TO: Tim Burton, City Manager

FROM: David L. Nielsen, City Attorney 

SUBJECT: Legal Analysis of Senate Bill 339 (2007 Legislative Session)

The City Commission requested a legal analysis of SB 339. SB 339 prohibits a municipality from annexing property located in an adjacent county without first obtaining the permission of the county commission of that county.

I believe the bill as currently drafted is legally deficient in several areas:

1. Illegal delegation of legislative authority;
2. Denial of due process under the 14th Amendment to the U.S. Constitution and Article II, Section 17, Montana Constitution; and
3. Equal protection under the 14th Amendment to the U. S. Constitution and Article II, Section 4, Montana Constitution.

DELEGATION OF LEGISLATIVE AUTHORITY

Annexation powers of municipalities and the procedures are clearly established in Title 7, chapter 2, parts 42 through 46, MCA. The six (6) methods of annexation are summarized in the attached file memorandum. Annexation by a municipality must be in strict conformance with these procedures. Even a municipality with self-governing powers is bound by these annexation procedures. Section 7-1-114(1), MCA. Thus, the final authority on annexation process is the state legislature. The legislature in §7-2-4703(3) and (4), MCA, established annexation standards for municipalities, as follows:

“(3) Municipal boundaries should be extended in accordance with legislative standards applicable throughout the state to include such areas and to provide the high quality of governmental services needed for the public health, safety, and welfare.

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(4) Areas annexed to municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality as soon as possible following annexation."

Counties, as political division of the state, only have those powers expressly provided by law or necessarily implied by those expressed. Counties were formed by the legislature without the consent of the people who inhabit the counties. *Lewis v. Petroleum County*, (1932), 92 Mont. 563, 17. P.2d 60. Counties traditionally have been considered as administrative agencies of the state that carry out established state policy. Therefore, annexations must be "in accordance with legislative standards applicable throughout the state." SB 339 contradicts this standard by establishing unregulated discretion in counties to disregard uniform standards.

In *Bacus v. Lake County* (1960), 138 Mont. 69, 78, 354 P.2d 1056, the court held:

"The law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers to an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid."

Bacus was followed and reaffirmed by the court in *In The Petition To Transfer Territory From High School District No. 6*, 2000 MT 342; 303 Mont. 204; 15 P.3d 447.

SB 339 does not contain any criteria, standard or rule for the counties to apply in exercising their decision whether to approve or deny annexation by a municipality located in another county.

Thus, SB 339 unconstitutionally delegates legislative powers to counties without any regard to the established legislative standards and policy provided by §7-2-4703, MCA.

DUE PROCESS

Due process under the 14th Amendment to the U.S. Constitution, and Article II, Section 17, Montana Constitution is violated by SB 339 because of the lack of rules, criteria or standards for the counties to follow in exercising discretion whether to allow annexation or not. Due process, a right to notice and hearing, is meaningless if the body conducting the

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hearing process is not bound to follow any law or standards. SB 339 gives unbridled discretion to county commissioners. This naturally means any decision on annexation is, *ipso facto*, arbitrary and capricious since there are no guidelines, standards, or rules to follow. SB 339 on its face violates the due process rights of any applicant who appears before a county seeking permission for annexation into a municipality.

EQUAL PROTECTION

Equal protection under the 14th Amendment to the U.S. Constitution and Article II, Section 4, means that government, including states, counties and municipalities, cannot discriminate against persons similarly situated unless there is a legally justifiable basis. Equal protection ensures that citizens are not subject to arbitrary and discriminatory state actions. Discrimination is not illegal per se, but the discriminatory action must be legally permitted. The level of judicial scrutiny for the legal basis depends upon whether the statute implicates a suspect class or fundamental right. Discrimination against a suspect class, such as for race, religion, gender, national origin, or creed, is not allowed except under a showing of a compelling government interest. In this case, assuming there is no suspect class and no fundamental right¹, the scrutiny to be applied is whether there is a rational basis. Under the rational basis test, the law or policy must be rationally related to a legitimate government interest. See *Powell v. State Compensation Ins. Fund*, 2000 MT 321, 302 Mont. 518, and *McDermott v. State Dep't of Corr.*, 2001 MT 134, 305 Mont. 462.

Under SB 339 there are two classes of persons subject to discrimination—those property owners annexing into a municipality already present in a county and those owners annexation into a municipality that is not present in a county. Applying the rational basis test, there is no legitimate government interest when a property owner in Jefferson County who seeks annexation by the City of Helena is treated differently than a property owner in Jefferson County who seeks annexation by the City of Boulder. The net effect to Jefferson County is identical in both situations. SB 339 does not set forth any legitimate government interest and therefore cannot justify through any rational basis the disparate treatment between these two classes of property owners. The distinction is arbitrary and the process for determining the treatment is baseless.

¹ A property owner in Jefferson County who seeks to fully develop property by receipt of city services through annexation in Helena may arguable claim this is a property right that is fundamental. See HB 590 (2007 Legislative Session)

AMENDMENT PROPOSAL ONE TO SB 339

Section 1. Annexation across county boundaries. (1) Except as provided in subsection (2), in all instances of annexation allowed under parts 42 through 47 of this chapter, a municipal governing body may not annex territory in a county that is different from the county in which the municipality is located.

(2) Subject to requirements of subsection (3), territory Territory in an adjoining county may be annexed by a municipal governing body if the governing body obtains the consent of the board of county commissioners of the county in which the territory is located.

(3) The consent of the board of county commissioners is only required if the board:

(a) after receiving a recommendation from joint or consolidated planning board with the affected municipality has adopted a neighborhood plan or provisions in the county's growth policy that establish:

(i) a statement of how the board intends to protect private property rights when considering applications for consent for annexation, and

(ii) development of criteria that is supportive of private property rights and upon which a decision on an application for annexation would be based; and

(b) provides by resolution a review process that specifies the information required for an application for consent for annexation and that complies with 7-21-1003.

Explanation for Amendment: (3)(a)(i) and (ii) are taken from HB 590 and are included to alert Board of its applicability. (3)(b) comes from §7-21-1003, MCA. Section 7-21-1003 applies to property development and standards for "site-specific development plan." A request for consent to annexation fits within this definition in 7-21-1002, MCA. Unless there are standards for review for annexation consents, the "completeness review process" in 7-21-1003, MCA, is meaningless. This amendment provides minimal due process to applicants for annexation.

2007 Montana Legislature

HOUSE BILL NO. 590

INTRODUCED BY EVERETT

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING GROWTH POLICIES TO INCLUDE CRITERIA TO PROTECT PRIVATE PROPERTY RIGHTS; REQUIRING A GOVERNING BODY TO VERIFY PROPERTY OWNER SUPPORT FOR A PROPOSED NEIGHBORHOOD PLAN BEFORE PROCEEDING; AMENDING SECTIONS 76-1-103 AND 76-1-601, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

...

(3) A growth policy must include:

(j) a statement of how the governing body intends to protect private property rights; and

(k) development of criteria by which local land use regulations will be determined to be supportive of private property rights.

7-21-1003. Local government regulations -- restrictions. (1) Unless a specific review process for an application is otherwise provided by law, the local government shall provide the applicant with a written receipt showing the date and time that the site-specific development plan was first submitted to the local government. The local government shall establish, by ordinance or resolution, a completeness review process, including time periods within which to determine whether the application contains all of the information required by the local government's ordinances, resolutions, or other regulations, and shall notify the applicant of the local government's determination as to whether or not the application is complete. If the applicant fails to submit the missing information within any applicable time period, the local government may deny approval of the site-specific development plan as an incomplete submission. A determination that a site-specific development plan is complete under this section does not limit the ability of the local government to request additional information during the review process.

(2) Except as provided under 76-2-206 or 76-2-306 or unless otherwise agreed to in writing by the applicant, the review and approval, approval with conditions, or denial of the site-specific development plan must be based solely upon the ordinances and regulations in effect at the time that the complete site-specific development plan was submitted to the local government entity that has jurisdiction over the application. Nothing in this subsection affects the ability of a local government to develop and impose conditions on a site-specific development plan as otherwise provided by law or by locally adopted ordinances or regulations.

History: En. Sec. 3, Ch. 516, L. 2005.

AMENDMENT PROPOSAL TWO TO SB 339

Section 1. Annexation across county boundaries. (1) Except as provided in subsection (2), in all instances of annexation allowed under parts 42 through 47 of this chapter, a municipal governing body may not annex territory in a county that is different from the county in which the municipality is located.

(2) Territory in an adjoining county may be annexed by a municipal governing body if:

(a) the annexation is with the consent of all the owners of the property proposed to be annexed; or

(b) the governing body obtains the consent of the board of county commissioners of the county in which the territory is located.

Explanation for Amendment: Allowing the owners of property to request annexation without first procuring the consent of the board of county commissioners addresses issues of denial of due process and equal protection.